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Opinion following transfer from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAUL OSUNA GUERRERO, Defendant and Appellant.	H041900 (Santa Clara County Super. Ct. No. C1476320)

In this case, following a jury trial, defendant Raul Osuna Guerrero was convicted of forgery (Pen. Code, § 476),[1] identity theft (§ 530.5, subd. (c)(1)), concealing or withholding stolen property (§ 496, subd. (a)), and contempt of court (§ 166, subd. (a)(4)). The trial court found a "strike" allegation to be true (§§ 667, subds. (b)-(i), 1170.12), which made defendant eligible for sentencing under the Three Strikes law.

Prior to sentencing defendant, the California voters enacted the Safe Neighborhoods and Schools Act (Proposition 47), which went into effect on November 5, 2014. (See Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, Cal. Const., art. II, § 10.) As amended by Proposition 47, section 473, subdivision (b), (§ 473(b)) generally provides that, with specified exceptions, "forgery relating to a check, bond, bank bill, note, cashier's check, traveler's check, or money order, where the value of the check, bond, bank bill, note, cashier's check, traveler's check, or money order does not exceed nine hundred fifty dollars ($950)" is punished by imprisonment in a county

[1] All further statutory references are to the Penal Code unless otherwise stated.

jail for not more than one year. The trial court, however, sentenced defendant on the forgery conviction to a four-year felony prison term under the Three Strikes law.

On appeal from the judgment of conviction, defendant argues that the trial court erred by (1) failing to retroactively reduce his forgery conviction to a misdemeanor pursuant to section 473(b) and (2) not properly instructing the jury on the charge of concealing or withholding stolen property (§ 496, subd. (a)). Defendant also asserts that defense counsel provided ineffective assistance by failing to alert the court that it had imposed an unauthorized felony sentence on his forgery conviction.

The California Supreme Court granted review in this case, and it subsequently transferred it to this court with directions to vacate our decision and to reconsider the cause in light of its decision in *People v. Gonzales* (2018) 6 Cal.5th 44 (*Gonzales*). In *Gonzales*, the court considered whether section 473(b)'s exclusion disqualified the defendant, who had been convicted of identity theft as well as forgery, from having his forgery conviction resentenced as a misdemeanor pursuant to section 1170.18. Section 473(b)'s exclusion states: "This subdivision shall not be applicable to any person who is convicted both of forgery and of identity theft, as defined in Section 530.5." In *Gonzales*, the Supreme Court framed the issue as "what relationship, if any, must exist between a person's convictions for forgery and identity theft for the identity theft conviction" to render the forgery conviction ineligible for punishment as a misdemeanor under section 473(b). (*Gonzales*, *supra*, at p. 46.)

We have now reconsidered this case under the guidance of *Gonzales*, and we again find no reversible error and affirm.

I

Procedural History

A second amended information filed against defendant charged him with two misdemeanors and two felonies: a violation of section 530.5, subdivision (c)(1) (acquiring or retaining possession of personal identifying information of another), a

misdemeanor (count 1); a violation of section 496, subdivision (a) (concealing or withholding stolen property), a felony (count 2); a violation of section 166, subdivision (a)(4) (contempt of court), a misdemeanor (count 3); and a violation of section 476 (forgery by possession of fictitious bill), a felony (count 4).[2] Counts 1, 2, and 4 were alleged to have occurred on or about February 12, 2014. Count 3 was alleged to have occurred on or about February 14, 2014. A "strike" (a prior robbery conviction) within the meaning of the Three Strikes law was also alleged. (See §§ 667, subds. (b)-(i), 1170.12.)

A jury found defendant guilty of all charges. The trial court found the strike allegation true.

After the voters approved Proposition 47 on November 4, 2014 and before the court sentenced defendant on January 5, 2015, defense counsel filed a written request asking the court to reduce count 4 (forgery under § 476) from a felony to a misdemeanor pursuant to section 17, subdivision (b). The request stated that the offense was for possession of a counterfeit $50 bill.

At the time of sentencing, the trial court denied the defense request to reduce count 4 to a misdemeanor pursuant to section 17, subdivision (b). The court explained the bases of its decision, namely that defendant stood convicted of multiple violations, he had "a long and virtually uninterrupted history of criminal conduct," and there was

[2] Section 530.5, subdivision (c)(1), states: "Every person who, with the intent to defraud, acquires or retains possession of the personal identifying information . . . of another person is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment." Section 476 provides: "Every person who makes, passes, utters, or publishes, with intent to defraud any other person, or who, with the like intent, attempts to pass, utter, or publish, or who has in his or her possession, with like intent to utter, pass, or publish, any fictitious or altered bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of any real or fictitious financial institution as defined in [s]ection 186.9 is guilty of forgery."

nothing in the circumstances of the offense to justify treating it as a misdemeanor. The court "recognize[d] that the single check that was made out to the defendant" did not exceed $950, but that was not "the test" under section 17, subdivision (b). The court also denied defendant's *Romero* motion (see *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 504).

The parties and the court agreed that count 2 (§ 496, subd. (a)) had been reduced to a misdemeanor by operation of law under Proposition 47, and the court deemed the offense a misdemeanor. The court sentenced defendant to a four-year term (double the two-year midterm under the Three Strikes law) on count 4 (forgery) and to concurrent two-month terms on counts 1, 2, and 3.

II

Facts

On February 12, 2014, two officers separately responded to a call of a party reporting that her father, defendant, was refusing to leave her apartment. Defendant was placed under arrest for violating a no-contact protective order. During a search of defendant, an officer found a wallet with a marijuana emblem on it in defendant's jacket and put it in a plastic bag with defendant's other personal items.

When defendant was booked into Santa Clara County's jail later that same day, a correctional officer inventoried defendant's personal property. In defendant's wallet, the officer found five checks, including a $400 check, dated February 10, 2014, written on the bank account of St. Thomas More Society of Santa Clara County (STMS), a Catholic organization for judges, lawyers, law professors, and law students. The STMS check found in defendant's possession was made out to a "Raul" with an indecipherable last name beginning with "G"; the signature on the check was illegible. What appears to be defendant's signature is on the back of the check.

In early February 2014, the society's financial documents and all of its checks had been taken from a vehicle belonging to Chris Boscia, who was then the society's

treasurer. The treasurer was the person authorized to write checks for the organization. The STMS check found in defendant's possession was dated after the checks had been taken from Boscia's vehicle, and it had not been signed by Boscia. The payee was not a person to whom the organization had written a check. Defendant did not have a vendor or payee relationship with the society. Defendant was not authorized to be in possession of the check. In mid-March 2014, the society's former treasurer received a call from Bank of America's fraud department, and he was informed that two of the stolen checks had been presented for cashing.

The four other personal checks found in defendant's wallet were from three individuals other than defendant. One of the personal checks appeared to have been made out to "DMV Renewals," and the name of the original payee had been written over. There was an illegible signature on the back. The checks recovered from defendant's wallet also included two checks from the bank account of Alberta Espinoza, who had been living in the same apartment complex as defendant's daughter sometime in March 2013. One of the Espinoza checks was made out to "daniel Rosbach" [*sic*] in the amount of $380, and the other check was blank. A fourth personal check, written on the bank account of a third person, was written for $200 and made payable to "Daniel Rosbach." There were illegible signatures on the back of both checks made payable to Rosbach. Defendant's wallet also contained a counterfeit $50 bill, a woman's California driver's license, and a State of California benefits identification card in the name of an individual other than defendant.

During a separate incident on November 16, 2013, an officer searched defendant's wallet, which had been found in defendant's right rear pants pocket. The officer found five counterfeit $20 bills and two counterfeit $10 bills in the wallet.

In an earlier incident on June 2, 2013, an officer searched defendant's wallet, which was found in defendant's pocket. The officer found two social security cards that

did not belong to defendant in the wallet. The names on the cards were Joseph Mike Ramirez and Enrique Chavez Santos.

When an officer contacted Ramirez by telephone, Ramirez reported that he had lost his social security card. Ramirez told the officer that he did not know defendant and that defendant did not have his permission to possess his social security card. The officer also determined, through a database search, that 42 different people had used the social security number appearing on Santos's social security card.

Defendant, who testified in his own behalf, admitted that he had endorsed the STMS check that had been found in his wallet on February 12, 2014 and that he had planned on depositing the check in his own bank account. Defendant also admitted that he had been previously convicted of violating Health and Safety Code section 11359 (possession of marijuana for sale) and second degree robbery.

III

Discussion

A. *Count 4—Forgery*

1. *The Rule of Estrada*

Count 4 alleged that defendant violated section 476 (forgery) by having in his "possession with the intent to pass, or to defraud, a fictitious bill, . . . a $50 bill, purporting to be real currency." Defendant asserts that the trial court imposed an unauthorized sentence on his forgery conviction because, under the rule of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), the conviction automatically became a misdemeanor since he was not yet sentenced when Proposition 47 went into effect on November 5, 2015.

"[The California Supreme Court's] decision in *Estrada* . . . supports an important, contextually specific qualification to the ordinary presumption that statutes operate prospectively: When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the

Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date. [Citation.]" (*People v. Brown* (2012) 54 Cal.4th 314, 323 (*Brown*); see *People v. Conley* (2016) 63 Cal.4th 646, 656 (*Conley*).) "The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not." (*Conley*, *supra*, at p. 657.)

The *Estrada* court reasoned: "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Estrada*, *supra*, 63 Cal.2d at p. 745.)

"*Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments. [Citation.]"[3] (*Brown*, *supra*, 54 Cal.4th at p. 324, italics added.) "[F]or the purpose of determining retroactive application of an amendment to a

[3] Section 3 states: "No part of it is retroactive, unless expressly so declared." The Civil Code and the Code of Civil Procedure also contain identical provisions (Civ. Code, § 3; Code Civ. Proc., § 3).

criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. [Citations.]" (*People v. Nasalga* (1996) 12 Cal.4th 784, 790, fn. 5 (*Nasalga*) (plur. opn. of Werdegar, J.).)

As a general rule, "*Estrada* stands for the proposition that, 'where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed.' (*Estrada*, *supra*, 63 Cal.2d at p. 748.)" (*Nasalga*, *supra*, 12 Cal.4th at p. 792 (plur. opn. of Werdegar, J.).) But "[t]o ascertain whether a statute should be applied retroactively, legislative intent is the 'paramount' consideration . . . ." (*Ibid*.) "Because the *Estrada* rule reflects a presumption about legislative intent, rather than a constitutional command, the Legislature (or here, the electorate) may choose to modify, limit, or entirely forbid retroactive application of ameliorative criminal-law amendments if it so chooses." (*Conley*, *supra*, 63 Cal.4th at p. 656.)

In this case, it may be inferred from the text of Proposition 47 and its legislative history that the voters intended that (1) the proposition's ameliorative statutory changes would have circumscribed retroactive effect with respect to those already sentenced before its effective date and (2) those previously sentenced defendants, who were currently serving sentences for felonies that are now misdemeanors under laws enacted or amended by Proposition 47, could seek relief under section 1170.18. (See Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, §§ 3, [purpose and intent], 14 [adding § 1170.18], analysis of Proposition 47 by the Legislative Analyst, pp. 35 [measure "allows certain offenders who have been previously convicted of such crimes to apply for reduced sentences"], 36 [measure "allows offenders currently serving felony sentences for [certain] crimes to apply to have their felony sentences reduced to misdemeanor sentences"; "certain offenders who have already completed a sentence for a felony that the measure changes could apply to the court to have their felony conviction changed to a misdemeanor"].) Section 1170.18 distinguishes between defendants already

sentenced for a felony conviction, whether final or not, and defendants yet to be sentenced, who are not covered by its provisions. (See *People v. DeHoyos* (2018) 4 Cal.5th 594, 597 [defendants who were serving felony sentences on the effective date of Proposition 47 but whose judgments were not final were not entitled to automatic resentencing under Proposition 47 and were required to seek resentencing pursuant to section 1170.18].)

Defendant asserts that the voters intended Proposition 47 to apply to qualified defendants who were yet to be sentenced (including him) and that *Estrada*'*s* presumption of retroactivity applies to that category of defendants. "The electorate is presumed to have been aware of *Estrada* and its progeny when they approved Proposition 47. [Citations.]" (*People v. Shabazz* (2015) 237 Cal.App.4th 303, 312; see *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1048 ["The voters are presumed to have been aware of existing laws at the time the initiative was enacted. [Citation.]".]) Since there was no savings clause or other textual indication that the proposition's ameliorative changes did not apply to defendants who had committed crimes before it went into effect but who had not yet been sentenced on its effective date, we assume for purposes of this appeal that section 473 as amended by Proposition 47 operates retroactively as to them. We find no basis for concluding that defendant was required to petition for relief under section 1170.18 after being sentenced under the law as it existed prior to the passage of Proposition 47.

2. *The Supreme Court's Gonzales Decision*

As *Gonzales* explains, section 473, subdivision (a), makes forgery "a 'wobbler' crime[, which is] punishable either as a felony or [as] a misdemeanor. [Citation.]" (*Gonzales*, *supra*, 6 Cal.5th at p. 46.) "When voters enacted Proposition 47, the Penal Code gained a new provision reducing punishment to a misdemeanor for 'forgery relating to a check, bond, bank bill, note, cashier's check, traveler's check, or money order, where the value of the check, bond, bank bill, note, cashier's check, traveler's check, or money

order does not exceed nine hundred fifty dollars ($950).' (§ 473[(b)].) But forgery remains a wobbler—and therefore an offense ineligible for reclassification as a misdemeanor under Proposition 47—for 'any person who is convicted *both* of forgery and of identity theft, as defined in Section 530.5.' [Citation.]" (*Ibid.*, italics added.)

The Supreme Court determined that "the term 'both' [as used in section 473(b)] establishes that a relationship is necessary between a forgery and identity theft conviction . . . ." (*Gonzales*, *supra*, 6 Cal.5th at p. 51.) The court observed that the Legislative Analyst had written, " 'Under current law, it is a wobbler crime to forge a check of any amount. Under this measure, forging a check worth $950 or less would always be a misdemeanor, except that it would remain a wobbler crime if the offender commits identity theft *in connection* with forging a check.' (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis. Analyst, p. 35, italics added.)" (*Id*. at pp. 52-53.) The court concluded: "Section 473(b) is best read to require that the offenses resulting in defendant's forgery and identity theft convictions must have been undertaken 'in connection with' each other to preclude him from resentencing eligibility. This understanding is consistent with the language and intended purpose of Proposition 47, and what insights we can glean from the ballot materials." (*Id*. at p. 56.) But the court "decline[d] to adopt a 'transactionally related' standard."[4] (*Id*. at p. 53.)

3. *Analysis*

Defendant argues in his supplemental brief that his forgery conviction and his identity theft conviction were unconnected because the former arose from his possession of "a counterfeit $50 bill" whereas the latter arose from his possession of other unrelated

[4] The appellate court in *Gonzales* had held that "section 473(b) precludes [resentencing] relief only if an identity theft offense is 'transactionally related' to a forgery conviction. [Citation.]" (*Gonzales*, *supra*, 6 Cal.5th at p. 46.) Two Supreme Court justices believed that section 473(b)'s exclusion should be narrowly construed to apply only if a defendant's identify theft and forgery convictions related to the same instrument. (*Id*. at pp 57-58 (conc. opn. of Corrigan, J., joined by Chin, J.).)

items. He asserts that there was "no relationship" between those convictions "other than the fact of [their] concurrent possession in a wallet," which was found in his pocket. He maintains that therefore the trial court erred in failing to reduce the forgery conviction to a misdemeanor.

Not surprisingly, the People argue in their supplemental brief that since defendant's "forgery and identity theft convictions were based on his simultaneous possession in his wallet of a forged $50 bill . . . and identity cards," those "convictions were 'undertaken "in connection" with each other[.]' " The People point out that the evidence used to prove the crimes overlapped, and they argue that the trial court did not err in sentencing the forgery conviction as a felony because defendant's forgery and identity theft convictions "arose from at least somewhat related conduct encompassing both" crimes. (*Gonzales, supra,* 6 Cal.5th at p. 54.) The People have the better argument.

In *Gonzales,* the Supreme Court concluded that "the voters' intended purpose—as evidenced by the election materials—was indeed to bar from resentencing only those offenders whose conduct related to the forgery and identity theft convictions were made 'in connection with' each other." (*Gonzales, supra,* 6 Cal.5th at p. 50.) The court reasoned that "[t]he relatively similar nature of the offenses mentioned in section 473(b) . . . suggests that the convictions in question must bear some meaningful relationship to each other—beyond the convictions' inclusion in the same judgment." (*Id.* at p. 54.)

Defendant Gonzales's offenses were "entirely unrelated" because his "forgery convictions were based on conduct committed in 2003, and his identify theft conviction was based on conduct committed in 2006 and 2007." (*Gonzales, supra,* 6 Cal.5th at p. 47.) The Supreme Court found that "[n]othing in the statutory design suggests that Gonzales should be barred from relief under Proposition 47 simply because his

convictions were consolidated and he was sentenced in a single proceeding." (*Id*. at p. 52.)

The *Gonzales* majority opinion acknowledged "the concurrence's reluctance to adopt the 'in connection with' language as the standard. [Citation.]" (*Gonzales*, *supra*, 6 Cal.5th at p. 53, fn. 6.) But it nevertheless concluded: "While this language does appear in the ballot pamphlet, we adopt this phrase because it is an apt description of the statutory requirement, bolstered by the pamphlet's contents—not merely because the language happens to appear in the pamphlet. Our interpretation of Proposition 47 is governed by the same principles that apply in construing a statute enacted by the Legislature. [Citation.] When we interpret statutory language, whether from an initiative or a legislatively enacted bill, we must often explain what an ambiguous term actually means. Here, the term 'both' establishes that some connection or relationship is necessary between a forgery and identity theft conviction to disqualify Gonzales from the benefit of having his sentence recalled. But because the word 'both' may be somewhat ambiguous . . . , we consider the statute's text and remedial purpose as well as extrinsic sources. [Citation.] The provision at issue stops well short of precluding relief for petitioners where the relationship between the two offenses is weak or nonexistent—and we find the 'in connection with' language aptly describes the kind of relationship necessary to conclude that a forgery conviction may not be subject to resentencing." (*Ibid*.)

The Supreme Court indicated that the use of the present tense in section 473(b) suggests that its prohibition applies where "at least somewhat related conduct encompass[ed] both forgery and identity theft . . ." (*Gonzales*, *supra*, 6 Cal.5th at p. 54) and that "the conviction for the forgery offense must at least occur in a timeframe concurrent with the conviction for identity theft." (*Ibid*.) The court determined that "the statute reflects a somewhat broader concern" with respect to defendants " '*convicted* both of forgery and of identity theft' (§ 473(b), italics added), not just a forgery done while

committing identity theft, or vice versa." (*Id*. at p. 55.) It stated that "the requirement that some connection or relationship exist between the offenses helps explain the Legislative Analyst's statement that check forgery would remain a misdemeanor except in cases where the offender commits identity theft in connection with forging a check. [Citation.]" (*Ibid*.)

In this case, the evidence showed that just such a meaningful connection or relationship existed between defendant's forgery offense and his identity theft offense, both crimes of possession. (See *ante*, fn. 2.) Here, defendant contemporaneously possessed another person's personal identifying information and a fictitious $50 bill. He was not entitled to be sentenced under 473(b) even though the *Estrada* rule applied to his forgery conviction.

B. *Counsel's Failure to Argue that Count 4 was a Misdemeanor*

Defendant argues that defense counsel provided ineffective assistance by failing to argue that Proposition 47 reduced count 4 to a misdemeanor. Since defendant cannot demonstrate any prejudice, his ineffective assistance of counsel claim must be rejected. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694, 697, 700; see *Harrington v. Richter* (2011) 562 U.S. 86, 105, 111-112.)

C. *Alleged Instructional Errors Related to Count 2*

1. *Background*

In the court below, defense counsel objected to the court's giving CALCRIM No. 376 (Possession of Recently Stolen Property as Evidence of a Crime) on the ground that it "seem[ed] to be circular in that . . . if you believe he had possessed stolen property, then it relate[d] to Count Two" and that involved "a piggybacking or circular argument." She did not object on due process grounds or on the ground that the instruction allowed jurors to draw an unconstitutional permissive inference.

The trial court gave a modified CALCRIM No. 376 instruction: "If you conclude that the defendant knew he possessed property and you conclude that the property had in

fact been recently stolen, you may not convict the defendant of Count Two, possession of stolen property, based on those facts alone. [¶] However, if you also find that supporting evidence tends to prove his guilt, then you may conclude that the evidence is sufficient to prove he committed possession of stolen property. [¶] The supporting evidence need only be slight. It need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, whether the property was modified or altered, along with any other relevant circumstances tending to prove his guilt of Count Two, possession of stolen property. [¶] *Remember that you may not convict defendant of any crime unless you are convinced that each fact essential to the conclusion that defendant is guilty of the crime has been proved beyond a reasonable doubt*." (Italics added.)

The trial court instructed the jury on count 2 pursuant to CALCRIM No. 1750, modified as follows: "The defendant is charged in Count Two with receiving, concealing or withholding stolen property in violation of Penal Code section 496(a). [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] One. The defendant received, concealed or withheld from its owner, or aided and abetted in concealing or withholding from its owner property that had been stolen. [¶] Two. When the defendant received, concealed or withheld from its owner, or aided in concealing or withholding from its owner property, he knew that the property had been stolen. [¶] And three. [T]he defendant actually knew of the presence of the property. [¶] Property is stolen if it was obtained by any type of theft. Theft includes obtaining property by larceny or misappropriation of [lost] property. [¶] You may not find the defendant guilty unless you all agree that the People have proved that the defendant possessed at least one stolen item and you agree on which stolen item he possessed."

2. *Instruction Pursuant to CALCRIM No. 376*

Defendant argues that his state and federal rights to due process were violated by the trial court's instruction pursuant to CALCRIM No. 376 and that the instruction

impermissibly diluted the reasonable doubt standard by telling the jury that "it only needed 'slight' supporting evidence to find the knowledge element of possession of stolen property [was] proven beyond a reasonable doubt."

"A long line of authority, culminating in *People v. McFarland* (1962) 58 Cal.2d 748, establishes that proof of knowing possession by a defendant of recently stolen property raises a strong inference of the other element of the crime: the defendant's knowledge of the tainted nature of the property. This inference is so substantial that only 'slight' additional corroborating evidence need be adduced in order to permit a finding of guilty. (*Id*. at p. 754.)" (*People v. Anderson* (1989) 210 Cal.App.3d 414, 421.) In *McFarland*, the California Supreme Court explained: "Possession of recently stolen property is so incriminating that to warrant conviction there need only be, in addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show his guilt. [Citations.] This court stated in *People v. Lyons*, 50 Cal.2d 245, 258[:] '[P]ossession of stolen property, accompanied by no explanation or an unsatisfactory explanation of the possession, or by suspicious circumstances, will justify an inference that the goods were received with knowledge that they had been stolen. The rule is generally applied where the accused is found in possession of the articles soon after they were stolen.' [Citations.]" (*McFarland*, *supra*, at p. 754.)

The substance of CALCRIM No. 376 was in effect approved in *People v. Gamache* (2010) 48 Cal.4th 347 (*Gamache*), which considered CALJIC No. 2.15, an analogous instruction. In that case, the California Supreme Court stated: "CALJIC No. 2.15 is an instruction generally favorable to defendants; its purpose is to emphasize that possession of stolen property, alone, is insufficient to sustain a conviction for a theft-related crime. [Citations.] In the presence of at least some corroborating evidence, it permits — but does not require — jurors to infer from possession of stolen property guilt of a related offense such as robbery or burglary. We have held the instruction satisfies the due process requirement for permissive inferences, at least for theft-related offenses:

the conclusion it suggests is ' "one that reason and common sense justify in light of the proven facts before the jury." ' [Citations.]" (*Gamache, supra,* at p. 375.)

In *People v. Seumanu* (2015) 61 Cal.4th 1293 (*Seumanu*), the defendant contended that CALJIC No. 2.15 "violated his constitutional rights by establishing a 'permissive inference of guilt based on evidence of conscious possession of recently stolen property' and, because the rule provides that only slight corroboration is thereafter needed, it dilutes the 'ineluctable rule that a criminal conviction may be predicated only on proof beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.)' " (*Seumanu, supra,* at p. 1350.) The California Supreme Court rejected that argument: "We have also previously addressed and rejected defendant's reasonable doubt argument, holding CALJIC No. 2.15 'does not establish an unconstitutional mandatory presumption in favor of guilt [citation] or otherwise shift or lower the prosecution's burden of establishing guilt beyond a reasonable doubt [citations].' (*People v. Gamache*, *supra*, 48 Cal.4th at p. 376.) Further, 'nothing in the instruction . . . relieves the prosecution of its burden to establish guilt beyond a reasonable doubt.' [Citations.] Because defendant advances no persuasive reason why our previous authority addressing this issue was in error, we adhere to them now and reject the claim that CALJIC No. 2.15 violated his constitutional rights." (*Id*. at p. 1351.)

The United States Supreme Court has generally permitted instruction concerning a permissive inference, "which allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. [Citation.]" (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157.) The court stated: "In that situation the basic fact may constitute prima facie evidence of the elemental fact. [Citations.] When reviewing this type of device, the Court has required the party challenging it to demonstrate its invalidity as applied to him. [Citation.] Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the

'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." (*Ibid*.)

"A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion." (*Francis v. Franklin* (1985) 471 U.S. 307, 314.) "A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved." (*Ibid*.) "A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. [Citation.]" (*Id*. at pp. 314-315; see *People v. Goldsmith* (2014) 59 Cal.4th 258, 270 ["Permissive inferences violate due process only if the permissive inference is irrational. [Citations.]"].)

Defendant has failed to demonstrate that CALCRIM No. 376's permissive inference was irrational in this case, or that the court's instruction concerning the permissive inference reduced the prosecution's burden of proof. He acknowledges that the evidence showed that he was in "possession of other contraband items" in addition to the stolen STMS check and that he had been in "possession of contraband items" on two prior occasions. As indicated, the evidence showed that defendant possessed multiple checks not belonging to him, including a stolen STMS check that was made out to and endorsed by him, someone else's state benefits card, someone else's driver's license, and a counterfeit $50 bill. On prior occasions, he had been found in possession of social security cards belonging to other persons and multiple counterfeit bills. Under the facts of this case, the permissive inference permitted under the court's instruction was rational.

Moreover, the challenged instruction specifically reminded the jurors that they "may not convict defendant of any crime unless [they] are convinced that each fact essential to the conclusion that defendant is guilty of the crime has been proved beyond a

reasonable doubt." The court gave extensive instructions on the presumption of innocence and the People's burden to prove defendant guilty beyond a reasonable doubt.

Defendant points out that a number of federal courts of appeals have reversed convictions where a trial court instructed a jury that "[o]nce the existence of the agreement or common scheme of conspiracy is shown, . . . slight evidence is all that is required to connect a particular defendant with the conspiracy." (*United States v. Partin* (5th Cir. 1977) 552 F.2d 621, 628 (*Partin*)[5], italics omitted; see *United States v. Dunn* (9th Cir.1977) 564 F.2d 348, 356-357 [restating the "slight evidence" rule to clarify that defendant's connection to the conspiracy need only be slight, but the connection must be proved beyond a reasonable doubt].) These cases do not convince us that the "slight evidence" instruction being challenged in this case unconstitutionally reduced the People's burden of proof.

The "slight evidence" instruction in criminal conspiracy cases, which some federal courts have denounced, permitted juries to find that a defendant was a participant in a criminal conspiracy based on "slight evidence." The "slight evidence" instruction at

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[5] The Fifth Circuit Court of Appeals has consistently condemned the giving of a "slight evidence" instruction regarding a defendant's connection to a criminal conspiracy. (See e.g. *United States v. Gray* (5th Cir. 1980) 626 F.2d 494, 500 ["The 'slight evidence' reference can only be seen as suffocating the 'reasonable doubt' reference."]; *United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256 ["erroneous instruction reduced the level of proof necessary for the government to carry its burden by possibly confusing the jury about the proper standard or even convincing jury members that a defendant's participation in the conspiracy need not be proved beyond a reasonable doubt" (fn. omitted)]; *Partin, supra,* 552 F.2d at p. 628 [appellate court bound by precedent to reverse]; *United States v. Marionneaux* (5th Cir. 1975) 514 F.2d 1244, 1249 [following *Brasseaux*]; *United States v. Brasseaux* (5th Cir.1975) 509 F.2d 157, 162 [Two possible dangers inherent in the "slight evidence" instruction: "First, the jury might be led to conclude that a defendant's participation in the alleged conspiracy need not be proved beyond a reasonable doubt. Second, they might simply become confused regarding the proper standard for linking a defendant to a conspiracy"; but court affirmed judgment because defendant failed to object below and court reiterated in several places in its instructional charge that each element of the offense must be proved beyond a reasonable doubt].)

issue here is distinguishable because it permits the jury to draw a permissive inference of guilt in a theft-related case from the evidence of predicate facts (knowing possession of property proved to be recently stolen and at least slight, additional supporting evidence of guilt), provided the People have proved every fact essential to a guilty verdict beyond a reasonable doubt.

In light of the entirety of the charge (see *People v. Salazar* (2016) 63 Cal.4th 214), the court's instruction pursuant to CALCRIM No. 376 did not violate due process by allowing the jury to draw an unconstitutional permissive inference or by unconstitutionally lowering the prosecution's burden of proof. (Cf. *People v. Moore* (2011) 51 Cal.4th 1104, 1130-1133; *Gamache, supra*, 48 Cal.4th at pp. 374-376.)

3. *Instruction Pursuant to CALCRIM No. 1750*

Defendant argues that the trial court's instruction pursuant to CALCRIM No. 1750 violated his constitutional right to due process of law by failing to define "aiding and abetting." Defendant contends that the trial court had a duty to instruct sua sponte on the meaning of that phrase because there was substantial evidence of aiding and abetting. He asserts that the court should have given CALCRIM Nos. 400 (Aiding and Abetting: General Principles) and 401 (Aiding and Abetting: Intended Crimes).[6] Defendant claims that "substantial evidence showed that persons other than [he] may have been direct principals in the theft and/or possession of the stolen STMS checks." He asserts that this court must reverse the conviction for violating section 496, subdivision (a), because the People cannot "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict." (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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[6] "[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.)

Under section 496, subdivision (a), "[e]very person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or *aids in concealing, selling, or withholding any property from the owner*, knowing the property to be so stolen or obtained" (italics added) commits a crime. We assume for purposes of this appeal that a person is guilty of violating section 496 by aiding "in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained" only if the person is liable as an aider and abettor and that a trial court is required to instruct on each element of aiding and abetting. We nevertheless conclude that any error by the trial court in failing to give an aiding and abetting instruction was harmless.

According to defendant's testimony at trial, he endorsed the STMS check for $400, which was made out to him, after his daughter (who exercised her Fifth Amendment right against self-incrimination when called as a witness at trial by defendant) showed him the check, indicated that she had received it from an assistance group that was helping her to cover her bills, and told him that she needed to pay her bills. Defendant claimed that he intended to have the STMS check deposited into his bank account and then allow his daughter to withdraw $400 from his account. Defendant's testimony did not establish that he was merely aiding his daughter's commission of the crime of concealing or withholding stolen property.

The stolen STMS check was found in defendant's wallet, which he was carrying, on February 12, 2014. That check appeared to have been made payable to defendant, he endorsed it, and he planned on depositing it into his own bank account. All evidence pointed to defendant's guilt as a direct perpetrator. The evidence that multiple STMS checks had been taken from the vehicle of the society's treasurer and the evidence that, after the stolen STMS check was found in defendant's possession, there had been attempts to cash two different STMS checks did not support an inference that defendant

was merely aiding his daughter or some other unknown direct perpetrator in the concealing or withholding of the stolen STMS check found in his wallet.

Even though the court's instruction suggested that defendant could be found guilty of violating section 496, subdivision (a), if he aided and abetted in concealing or withholding stolen property from its owner, the prosecutor did not rely on an aiding and abetting theory. Further, the court specifically told the jury: "Some of these instructions may not apply depending on your findings about the facts of the case. Don't assume that just because I give a particular instruction, I am suggesting anything about the facts. [¶] After you have decided what the facts are, then follow the instructions that do apply to the facts as you find them." Under the instructions given, the jury necessarily found that defendant knew that the property (a check) had been stolen and he knew of its presence. Based on the evidence, the jury could not have rationally found that defendant was not guilty as a direct perpetrator but was guilty as an aider and abettor. The error, if any, in failing to specifically instruct on aiding and abetting was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24; see *Neder v. United States* (1999) 527 U.S. 1, 8-16 [instruction that omits element of offense is subject to harmless error analysis under *Chapman*]; *People v. Dyer* (1988) 45 Cal.3d 26, 64 [*Chapman* standard of review applies to *Beeman* error].)

DISPOSITION

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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PREMO, ACTING P.J.

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MIHARA, J.

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